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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 31

[FAC 2005-75; FAR Case 2014-012; Item III; Docket 2014-0012, Sequence 1]

RIN 9000-AM75

Federal Acquisition Regulation; Limitation on Allowable Government Contractor Compensation Costs

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 702 of the Bipartisan Budget Act of 2013. In accordance with section 702, the interim rule revises the allowable cost limit relative to the compensation of contractor and subcontractor employees. Also, in accordance with section 702, this interim rule implements the possible exception to this allowable cost limit for scientists, engineers, or other specialists upon an agency determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities.

DATES: Effective date: **June 24, 2014.**

Comment date: Interested parties should submit written comments to the Regulatory Secretariat on or before **[insert date 60 days after FEDERAL REGISTER publication date]** to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-75, FAR Case 2014-012, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2014-012". Select the link "Comment Now" that corresponds with "FAR Case 2014-012." Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2014-012" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration,
Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F
Street, NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-75, FAR Case 2014-012, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-75, FAR Case 2014-012.

SUPPLEMENTARY INFORMATION:

I. Background

The Bipartisan Budget Act of 2013 (Pub. L. 113-67) was enacted on December 26, 2013. Section 702 of the law amended the allowable cost limits of contractor and subcontractor employee compensation. Specifically, section 702 revised the application of the compensation cap, the amount of the cap, and the associated formula for annually adjusting it. The existing formula for determining the limit on the allowability of contractor and subcontractor employee compensation costs under 41 U.S.C. 1127 was repealed. Section 702 of the law set the initial limitation on allowable contractor and subcontractor employee compensation costs at \$487,000 per year, which will be adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics.

This interim rule also implements the authority provided by 10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as amended by section 702(a), in which Congress has authorized the head of executive agencies to establish "one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities."

In section 702(c), Congress stated that the revised compensation cap "shall apply only with respect to costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act". As the date of enactment was December 26, 2013, 180 days after is June 24, 2014. Accordingly, the revised compensation cap in this interim rule will apply to the costs of compensation for all contractor and subcontractor employees for contracts awarded, and costs incurred, on or after June 24, 2014.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

An analysis of data in the Federal Procurement Data System (FPDS) revealed that most contracts awarded to small entities are awarded on a fixed-price basis, and do not require application of the cost principle contained in this rule.

The interim rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be

obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-75, FAR Case 2014-012) in correspondence.

IV. Paperwork Reduction Act

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

V. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services Administration (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because section 702 of Pub. L. 113-67, signed into law on

December 26, 2013, required that it shall apply only with respect to the costs of compensation incurred under contracts entered into on or after the date that is 180 days after the date of the enactment of this Act (June 24, 2014). This statute revises the allowable cost limit relative to the compensation costs of contractor and subcontractor employees. Therefore, issuing an interim rule that is effective upon publication, prior to the receipt of public comment will allow agencies and contractors to implement the requirements of this law by the required date of June 24, 2014. Pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Part 31

Government procurement.

Dated: June 13, 2014.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 31, as set forth below:

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 31 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 31.205-6 by—

- a. Revising the heading of paragraph (p), and paragraphs (p) (1) and (p) (2);
- b. Redesignating paragraph (p) (3) as paragraph (p) (4); and
- c. Adding a new paragraph (p) (3).

The revised and added text reads as follows:

31.205-6 Compensation for personal services.

* * * * *

(p) Limitation on allowability of compensation. (1) Senior executive compensation limit for contracts awarded before June 24, 2014. (i) Applicability. This paragraph (p) (1) applies to the following:

(A) To all executive agencies, other than DoD, NASA, and the Coast Guard, for contracts awarded before June 24, 2014;

(B) To DoD, NASA, and the Coast Guard for contracts awarded before December 31, 2011;

(ii) Costs incurred after January 1, 1998.

Costs incurred after January 1, 1998 for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP), under 41 U.S.C 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 2324(e)(1)(P) and 41 U.S.C 4304(a)(16), as in effect prior to June 24, 2014). This limitation is the sole statutory limitation on allowable senior executive compensation costs incurred after January 1, 1998, under contracts awarded before June 24, 2014, and applies whether or not the affected contracts were previously subject to a statutory limitation on such costs. (Note that pursuant to section 804 of Pub. L. 105-261, the definition of "senior executive" in paragraph (p)(4) has been changed for compensation costs incurred after January 1, 1999.)

(2) All employee compensation limit for contracts awarded before June 24, 2014. (i) Applicability. This paragraph (p)(2) applies to DOD, NASA, and the Coast Guard for contracts awarded on or after December 31, 2011 and before June 24, 2014;

(ii) Costs incurred after January 1, 2012.

Costs incurred after January 1, 2012, for the compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C 1127 are unallowable (10 U.S.C. 2324(e)(1)(P)).

(3) All employee compensation limit for contracts awarded on or after June 24, 2014. (i) Applicability.

This paragraph (p)(3) applies to all executive agency contracts awarded on or after June 24, 2014, and any subcontracts thereunder;

(ii) Costs incurred on or after June 24, 2014.

Costs incurred on or after June 24, 2014, for the compensation of all employees in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator of the Office of Federal Procurement Policy are unallowable. See <http://www.whitehouse.gov/omb/procurement/cecp>.

(iii) Exceptions. An agency head may establish one or more narrowly targeted exceptions for scientists, engineers, or other specialists upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and

capabilities. In making such a determination, the agency shall consider, at a minimum, for each contractor employee in a narrowly targeted excepted position—

(A) The amount of taxpayer funded compensation to be received by each employee; and

(B) The duties and services performed by each employee.

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